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(2006) 09 P&H CK 0293

High Court Of Punjab And Haryana At Chandigarh

Case No: None

Srikantam Talkies	APPELLANT
Vs	
Employees' State Insurance Corporation and Another	RESPONDENT

Date of Decision: Sept. 12, 2006

Acts Referred:

- Employees State Insurance Act, 1948 - Section 82

Citation: (2007) 113 FLR 184

Hon'ble Judges: L. Narasimha Reddy, J

Bench: Single Bench

Final Decision: Allowed

Judgement

L. Narasimha Reddy, J.
These two Civil Miscellaneous Appeals are presented u/s 82 of the Employees'' State Insurance Act, for short "the Act", by a cinema establishment viz., Srikantam Talkies, Kamalanagar, Ananthapur. In both the appeals, the dispute is about the very applicability of the provisions of the Act, to the appellant. While C.M.A. No. 633 of 2006 relates to the period between July 1991 and July 1999, C.M.A. No. 1275 of 2005 is in relation to the subsequent spell up to March 2001.

The appellant cinema theatre was established in the year 1963. The number of persons employed by it, was less than 20. Attendance registers were being maintained by it. It is stated that the maintenance of cycle stand and canteen in the theatre was leased to third parties, and that it has nothing to do with the employees engaged therein.

2. The Inspector of the ESI Corporation visited the theatre on 23.7.1991. At that time, the attendance register contained 11 names. At his instance, four more names were added. Thereafter, notices were issued directing the appellant, to explain as to why, it shall not

be brought under the purview of the Act. The appellant pleaded that as and when notices were received, replies were submitted. Two demand notices, dated 15.9.1999 and 20.9.1999 covering the period between 1991 and 1999 were served on the appellant. Replies were submitted, and ultimately, recovery order dated 20.9.1999 was passed in relation to the said notices. Assailing the same, the appellant tiled EIC No.75 of 1999, before the Employees" Insurance Court and Chairman of the Industrial Tribunal, for short "the Tribunal". The appellant urged several grounds, touching upon the very applicability of the Act, to it. It was pleaded that the number of employees engaged by it never exceeded 20. Other grounds were also urged.

3. Respondents filed counter affidavit, denying the allegations. It was stated that during the course of inspection, in July 1991, the number of employees was found to be more than 20. They also raised the ground of limitation. Oral and documentary evidence was adduced by the parties, and the Tribunal, dismissed the EIC No. 75 of 1999 on 12.4.2001. CMA No. 633 of 2006 is filed against it.

4. After the dismissal of EIC No. 75 of 1999, the respondents issued recovery order dated 14.12.2001, for the subsequent period. The appellant filed EIC No. 49 of 2002, before the Tribunal. The same contentions were repeated by both the parties before the Tribunal and the case was dismissed on 30.9,2005. CMA No. 1275 of 2005 arises out of it.

5. Sri Vedula Srinivas, learned Counsel for the appellant, submits that the Inspector of the Corporation, who visited the appellant on 23.7.1999, highhandedly and unlawfully included four names, in the Attendance Register, without any basis. He contends that even after addition of the four names, the number did not exceed 20 and despite the same, he proceeded as though the theatre is covered by the Act. He submits that the four names got included by the Inspector, were, of the persons engaged for maintenance of canteen and cycle stand, and even after their inclusion, the number did not touch 20. It is also his case that the demand notice issued by the respondents is barred by limitation, prescribed under the Act.

6. Smt. Pushpender Kaur, learned Counsel for the respondent Corporation, submits that EIC No. 75 of 1999 was filed 8 years after the notice of coverage was issued, and it was clearly barred u/s 77 of the Act. She contends that the finding recorded against the appellant that it is covered by the provisions of the Act has become final, and it was not at all open to it, to challenge the demand notice. Learned Counsel further points out that no substantial question of law arises for consideration, and the appeal is liable to be dismissed in limini. As regards the CMA No. 1275 of 2005, she contends that once the appellant was covered under the Act, and a demand notice was issued, the coverage for the subsequent years is a matter of course.

7. It is a matter of record that the appellant was not brought under the purview of the Act, up to the year 1991. The periodical inspections by the concerned officials reveal that the number of employees engaged by the appellant during that period was below 20. On the

basis of an inspection caused on 23.7.1991, the Corporation initiated steps for bringing the appellant, under the cover of the Act. Though the exchange of notices and replies between the parties went on for quite some time, the ultimate demand, or the action for recovery of the arrears, emerged in the year 1999. Soon thereafter, the appellant instituted the proceedings before the Tribunal.

8. In its counter affidavit, the Corporation raised an objection as to the limitation. It does not appear to have been pressed at the subsequent stages. Neither any issue was framed by the Tribunal on this, nor any arguments appear to have been advanced by the Parties. So is the case with the plea raised by the appellant that the demand for a period exceeding five years cannot be sustained in law. Both the contentions are based upon Section 77 of the Act. Before this Court, they have been argued at length. Learned Counsel for the Corporation contends that the objection as to the limitation can be raised, even at a subsequent stage, and that the case filed by the appellant before the Tribunal was barred by limitation.

9. Section 77 of the Act stipulates various periods of limitation, in relation to, the proceedings before the Tribunal, and it reads as under:

77. Commencement of proceedings: - (1) The proceedings before an Employees'' Insurance Court shall be commenced by application.

(1-A) Every such application shall be made within a period of three years from the date on which the cause of action arose.

Explanation: For the purpose of this sub-section,

(a) the cause of action in respect of a claim for benefit shall not be deemed to arise unless the insured person or in the case of dependants'' benefit, the dependants of the insured person claims or claim that benefit in accordance with the regulations made in that behalf within a period of twelve months after the claim became due or within such further period as the Employees'' Insurance Court may allow on grounds which appear to it to be reasonable;

(b) the cause of action in respect of a claim by the Corporation for recovering contributions (including interest and damages) from the principal employer shall be deemed to have arisen on the date on which such claim is made by the Corporation for the first time:

PROVIDED that no claim shall be made by the Corporation after five years of the period to which the claim relates;

(c) the cause of action in respect of a claim by the principal employer for recovering contributions from an immediate employer shall not be deemed to arise till the date by which the evidence of contributions having been paid is due to be received by the

Corporation under the regulations.

(2) Every such application shall be in such form and shall contain such particulars and shall be accompanied by such fee, if any, as may be prescribed by rules made by the State Government in consultation with the Corporation.

10. Sub-section (1-A), in its first limb mandates that the period of presentation of application for commencement of the proceedings shall be three years from the date on which the cause of action had arisen. The expression "cause of action" is defined in relation to three separate eventualities. The first is as regards the claims to be submitted by the insured persons or their dependants; the second is about the claim of the Corporation, to recover the contributions, and the third is about the claim of the principal employer to recover contribution from the immediate employer. We are concerned with clause (b) of Sub-section (1-A), which relates to the claim of the Corporation to recover the contributions.

11. In a way, it can be said that the clause defines the claim of the Corporation, more from the point of view of the employer. The cause of action can be said to have arisen for the Corporation to recover contribution for the first time from the date on which the claim was made by it. The word "claim" assumes importance, in this regard. The reason is that it is from the date of making the claim, that the cause of actiori was deemed to have arisen. In this context, the "claim", almost resembles, to the demand. It cannot be stretched to the stage or exercise, preceding the demand. The whole exercise of making inspection, issuance of notice of coverage, consideration of the explanation submitted by the employer; have ultimately to culminate in making the "claim" by the Corporation. It is only when the claim is made, that a cause of action would accrue to the Corporation, to recover the amount of contribution. Correspondingly, the right to raise an objection, to the steps, for recovering the contribution would arise for an employer, only when a claim is made by the Corporation; Howsoever lengthy or voluminous, the respondents (sic. correspondence) may be, in relation to coverage, the actual necessity for an employer, to invoke the machinery under the Act, would arise only when a claim is made, in the form of a demand.

12. Proviso to clause (b) of Sub-section (1-A) mandates that the Corporation shall not be entitled to make any claim, after the expiry of five years period, from the date on which, the claim had arisen. The cumulative effect of this proviso is that,

(a) the cause of action for the Corporation to recover contributions would arise, from the date on which the claim, obviously in the form of demand, is made by it, for the first time,

(b) such claim cannot be made after expiry of five years from the date on which it had arisen; and

(c) the right of an employer to challenge the claim would arise only when it is made, and not earlier thereto.

13. Viewed from this angle, it is evident that in the instant case, the claims were made against the appellant for the first time in the year 1999, and soon thereafter, the appellant filed E.I.C. No. 75 of 1999. In that view of the matter, it cannot be said that the case filed by the appellant before the Tribunal was barred by limitation.

14. Admittedly, the notices dated 15.9.1999 and 20.9.1999 covered the period from 1991 to 1999. This is contrary to proviso to clause (b) of Sub-section (1-A) of Section 77 of the Act. The claim could have been, at the most, from 1994 onwards. This aspect was also not dealt with by the Tribunal.

15. The sole basis for the Corporation to make claim against the appellant was the entry in the attendance register, for the year 1991. The same was marked as Ex. P-14. This Court summoned the record, and on a perusal of Ex. P-14 it is clear that it was only in the month of July 1991, that four names were added to the existing 11. Neither in the months preceding July, nor in any month subsequent thereto, the four names were shown. The allegation of the appellant that the Inspector, who visited the appellant on 23.7.1999, got the four names included forcibly; gains strength from the above fact. Further, in the inspection report also, the names of the other persons, who were found to have been employed; exceeding the number 20, was indicated. When the appellant was going to be fastened with the liability, for all the years to come, the respondents, ought to have been careful, and definite; on facts.

16. It may be true that at this length of time, it may not be that easy to furnish the particulars, or explain the circumstances under which the appellant was brought under the purview of the Act. At the same time, the uncertainty prevailing in the matter cannot be read, to the detriment of the appellant. It must be noticed that the is, between the appellant, the Corporation, and the respondents; does not relate to themselves, personally. It is in relation to the extension of benefit to the employees of the appellant, that the Corporation is endowed with the responsibility to ensure that the provisions of the Act are implemented. It is equally under the obligation to ensure that no employer, or no agency, which is otherwise not under obligation, is brought under the purview of the Act. The exercise to be undertaken in this regard must be objective and transparent. Liability can neither be fixed nor erased on the basis of surmises and assumptions. Unfortunately, the Tribunal did not choose to examine the record from the proper perspective, much less did it address itself to the various questions of fact and law, which arise for consideration.

17. For the foregoing reasons, the Appeals are allowed, and the matters are remanded to the Tribunal for fresh consideration. It shall be open to the parties to adduce such oral and documentary evidence, as they intend to. There shall be no order as to costs.